SUPREME COURT, U. S.

FILED

SEP 6 1974

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1716

NORBERT A. LAING, an individual, on behalf of himself and all other persons, associations, firms and corporations similarly situated,

Petitioner,

vs.

MINNESOTA VIKINGS FOOTBALL CLUB, INC., John Doe, Richard Roe, et al., A.F.C., Inc., et al.,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 24, Subdivision 5, of the Revised Rules of the Supreme Court of the United States, respondent Minnesota Vikings Football Club, Inc. calls to the attention of the Court the decision of the United States Court of Appeals for the Fifth Circuit in the case of *Driskill v. Dallas Cowboys Football Club, Inc., et al.*, No. 73-2659, rendered on August 9, 1974, a date subsequent to the filing of respondent's Brief in Opposition to Petition for Writ of Certiorari.

The decision of the Court of Appeals affirms the decision of the United States District Court for the Northern District of Texas granting summary judgment in favor of the football club, cited in respondent's main brief in the footnote on page 5 thereof.

A copy of the opinion of the Court of Appeals is set forth in the Appendix.

Respectfully submitted,

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APPENDIX

RICHARD E. DRISKILL, Plaintiff-Appellant,

v.

DALLAS COWBOYS FOOTBALL CLUB, INC., et al., Defendants-Appellees.

No. 73-2659.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Aug. 9, 1974.

Action was brought by an individual against a professional football club and a city in which it was alleged that the defendants had established an illegal tying arrangement requiring the purchase of preseason tickets and low-interest stadium bonds as a condition for the purchase of a season ticket package. The United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, Jr., Chief Judge, entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Thornberry, Circuit Judge, held that summary judgment had been properly entered in view of the fact that plaintiff had not pleaded that the tying of season tickets to preseason tickets and stadium bonds had any anticompetitive effect and had not alleged with particularity and material facts in issue that would support a finding of anticompetitive effects or coercion to purchase the bonds.

Affirmed.

1. Monopolies

Characteristics of illegal tying arrangement are: (1) two separate products, the tying product and the tied product; (2)

sufficient economic power in tying market to coerce purchase of tied product; (3) involvement of not insubstantial amount of interstate commerce in tied market; and (4) anticompetitive effects in tied market. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Federal Civil Procedure

For purpose of withstanding defendants' motion for summary judgment in antitrust action alleging illegal tying arrangement, existence of not insubstantial amount of interstate commerce in allegedly tied market of season professional football tickets was established by affidavit of president of football club indicating that season ticket holders had accounted for approximately one-half of seating capacity of club's stadium. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Federal Civil Procedure

In action alleging that professional football club and city had established illegal tying arrangement by requiring purchase of preseason tickets and low-interest stadium bonds as condition for purchase of season ticket package, issues of separability of preseason and regular season ticket product markets and existence of sufficient market power to coerce purchase of tied product were triable issues of fact not subject to proper adjudication by summary judgment. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. Monopolies

Where professional football club had complete monopoly in allegedly tied market of preseason professional football games in city and there could thus be no adverse effect on any competitors caused by club's tying purchase of season tickets to purchase of preseason games, tying arrangement was not

illegal under Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. Monopolies

Act of professional football club and city in tying purchase of season football tickets to purchase of low interest stadium bonds did not constitute illegal tying arrangement in absence of exploitation of club's monopoly for purpose of coercing purchase of bonds, and anticompetitive effect in tied market for bonds.

Appeal from the United States District Court for the Northern District of Texas.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

THORNBERRY, Circuit Judge:

Driskill brought this action under § 1 of the Sherman Anti-Trust Act, 15 U.S.C.A. § 1, alleging that the Cowboys and the City of Irving have established an illegal "tying" arrangement, requiring the purchase of undesirable items—preseason tickets and low-interest stadium bonds—as a condition for the purchase of the desirable item—the season ticket package, with its attendant preferential seating location, parking privileges, and right to reserve a season ticket and a particular seat for the following season. The district court granted summary judgment in favor of defendants, holding as follows: (1) since single game tickets have been available for every home game in the past, Driskill has not been coerced to buy preseason tickets in order to gain admission to the regular season games; (2) the granting of preferred parking to season ticket holders is a reasonable business practice with no anti-competitive effect; (3) since individual home game tickets have always

been available, Driskill has not been coerced to buy a stadium bond in order to gain admission to regular season games; and (4) forcing the purchase of a stadium bond or bonds as a prerequisite to the purchase of a season ticket package has no anticompetitive effect. We affirm on the ground that Driskill has not pleaded that the tying of season tickets to preseason tickets and stadium bonds has any anti-competitive effect, nor has he alleged with particularity any material facts in issue what would support a finding of anti-competitive effects or coercion to purchase the bonds so as to avoid an adverse summary judgment.

There has been a spate of cases alleging Sherman Act violations in the tying of preseason tickets to season tickets by various National Football League teams. These cases have all resulted in summary judgments for the defendant teams. *See* Pfeiffer v. New England Patriots Football Club, Inc., D. Mass. 1972, 1973 Trade Cas. ¶ 74,267, appeal dismissed, 1 Cir., Nov. 1, 1972, No. 72-1306; Laing v. Minnesota Vikings Football Club, Inc., D. Minn. 1973, 372 F.Supp. 59, aff'd, 8 Cir. 1974, 492 F.2d 1381, petition for cert. filed, 42 U.S.L.W. 3693, U.S., May 16, 1974; Coniglio v. Highwood Services, Inc. [Buffalo Bills], W.D.N.Y., 1973, 60 F.R.D. 359, aff'd, 2 Cir. 1974, 495 F.2d 1286; Grossman Development Co. v. Detroit Lions, Inc., E.D. Mich. 1973, 1973-2 Trade Cas. ¶ 74,790, appeal docketed, 6 Cir. 1974, No. 74-1093; Rubin v. Miami Dolphins, Ltd., S.D. Fla., May 22, 1974, No. 74-129-Civ-CA. Summary judgments have been granted or upheld on appeal on three different theories: (1) that fans are not in fact coerced into buying tickets to preseason games (as part of a season ticket package) in order to gain admission to regular season games; (2) that no tying of one product to another is possible, since there do not exist two different products—preseason and regular

season games—but rather only one indivisible product—professional football games; and (3) that the tying of preseason to regular season tickets has no anticompetitive effect in the tied market. We agree with the conclusion reached by the Second Circuit after a very careful analysis in *Coniglio*, that, although neither of the first two theories is sufficient to sustain the summary judgment here, the last provides a basis of affirmance. *See also* Grossman Development Co. v. Detroit Lions, Inc., *supra*.

[1] A tying agreement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. . . ." Northern Pacific Ry. v. United States, 1958, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545. Tying agreements violate the Sherman Act whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. Id. at 6, 78 S.Ct. at 518. Thus there are four characteristics of an illegal tying arrangement:

(1) two separate products, the tying product and the tied product;

(2) sufficient economic power in the tying market to coerce purchase of the tied product;

(3) involvement of a not insubstantial amount of interstate commerce in the tied market; and

(4) anticompetitive effects in the tied market.

Coniglio v. Highwood Services, Inc., 2 Cir. 1974, 495 F.2d at 1289.

[2-4] It seems clear here, as in *Coniglio*, that a not insubstantial amount of interstate commerce in the tied market is involved, since, according to the affidavit of Texas E. Schramm, President of the Cowboys, season ticket holders

have accounted for approximately one-half of the seating capacity of the stadium. Similarly, we agree with the *Coniglio* court that the issues of separability of the preseason and regular season ticket product markets and existence of sufficient market power to coerce purchase of the tied product are triable issues of fact not subject to proper adjudication by summary judgment. As in *Coniglio*, however, the Cowboys have a complete monopoly in the tied market—preseason professional football games in Dallas—and there can thus be no adverse effect on any competitors, even if a tying scheme exists. There being no anticompetitive effect in the tied market, the fourth requirement for a Sherman Act tying scheme is not met, and the portion of Driskills' suit dealing with preseason game tickets was properly dismissed on summary judgment for the defendants.

[5] This suit presents a claim not present in any of the other litigation, however. Driskill alleges the tying of undesirable low-interest stadium bonds to the desirable season ticket package, while all the other suits presented only the issue of tying preseason game tickets to those for the regular season games. This claim quite clearly involves two different products—long-term bonds and football tickets—and the Cowboys concededly have a complete monopoly over the latter, which is the tying product. However, even assuming that Schramm's affidavit establishes that a not insubstantial amount of commerce is involved, since each of the season ticket holders must buy one or more stadium bonds which cost $250 each, Driskill failed to forestall summary judgment on this part of his claim by failing to assert specific facts tending to show either exploitation of their monopoly by the Cowboys to coerce the purchase of the bonds or any anticompetitive effect in the tied market for long-term bonds. Since Driskill

failed to come forth with a showing of any specific facts supporting his position with regard to either coercion or anticompetitive effects, the summary judgment against him was proper.

Affirmed.